NG LI LIN v. TING TIAN HWA

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[ORIGINATING SUMMONS NO: 24NCVC-444-12-2015]
16 NOVEMBER 2016

LAND LAW: *Caveats – Removal – Application for – Property acquired during marriage – Wife registered as sole proprietor of property – Wife left property after matrimonial discord – Husband entered private caveat on property – Financial contributions of husband and wife towards purchase of property – Whether contributions of parties proved – Whether husband proved definite, determinate and registrable interest in property – Whether husband had beneficial or equitable interest to enable lodgement of private caveat on property – National Land Code, ss. 327 & 329*

FAMILY LAW: *Matrimonial property – Beneficial interest – Husband and wife purchased property during marriage – Wife registered as sole proprietor of property – Wife left property after matrimonial discord – Husband entered private caveat on property – Whether husband had strong basis to enter caveat on property – Whether to protect property from being disposed or dissipated – Whether interest of spouse caveatable – Law Reform (Marriage & Divorce) Act 1976, ss. 76 & 102*

TRUSTS: *Resulting trust – Advancement – Presumption of advancement – Property purchased by husband and wife during marriage – Husband advanced payment as gift to wife – Wife registered as sole proprietor of property – Whether presumption of resulting trust arose from advancement of payment – Whether relationship of parties negated presumption of resulting trust – Whether presumption of advancement rebutted*

The defendant and the plaintiff were husband and wife. During the course of their marriage, the pair had purchased a piece of property ('the property'). The defendant paid the vendor of the property the (i) initial down payment/ booking fee; and (ii) deposit and part payment of the purchase price. The sale and purchase agreement ('the SPA') was signed by the plaintiff as the sole purchaser of the property. The plaintiff then obtained a loan from the bank to part finance the purchase. The balance between the purchase price and the loan was RM134,667 and after deducting a gift of RM50,000 advanced by the defendant, the differential sum to be paid was RM84,667. The plaintiff paid the differential sum using her own financial resources. Upon settlement of the full purchase price, the vendor transferred ownership of the property to the plaintiff, making her the sole registered proprietor. The property was then charged to the bank as security for the repayment of the loan and the plaintiff averred that she paid the monthly loan repayment until December 2013. Following a matrimonial discord with the defendant, the plaintiff permanently left the property in March 2014. As she was facing financial difficulties in servicing the loan, the plaintiff wished to sell the property.

A According to the plaintiff, the loan repayment was in default leading to the bank commencing foreclosure proceedings against her. She had entered into a SPA to sell the property and the loan repayment needed to be regularised. However, the defendant lodged a private caveat on the property. By way of the present application, the plaintiff sought to remove the private caveat
B pursuant to ss. 327 and 329 of the National Land Code to complete the sale transaction. In opposing the plaintiff's application, the defendant argued that he had beneficial and equitable interests in the property as (i) the property served as the matrimonial home of the parties; and (ii) he had contributed financially to the purchase of the property.

C **Held (allowing application):**

(1) Only a person/body who has caveatable interest can lodge a caveat on the land. A caveator must prove the existence of his caveatable interest before the caveat is allowed to stand. The manner in which the defendant's alleged caveatable interest in the property was set out in
D Form 19D was flawed and failed to meet the minimum legal requirements of stating the exact nature and extent of his alleged beneficial interest. The defendant did not set out his claim to title or registrable interest in the property in Form 19B. The grounds set out by the defendant in his statutory declaration were also vague and rather
E imprecise. The defendant did not state (i) whether he was the one who paid the whole of the purchase price for him to be the sole beneficial owner of the property; (ii) the amount of his contribution towards the purchase consideration; and (iii) the fact that the plaintiff, the registered proprietor, was his lawful wife and that the property was their
F matrimonial home. Therefore, the defendant had not shown a definite, determinate and registrable interest in the property. This by itself was sufficient to remove the caveat. (paras 14 & 17-21)

(2) The High Court, in its matrimonial jurisdiction, has the exclusive jurisdiction to decide on the rights of the parties to a share of assets
G acquired during a marriage. That jurisdiction can only be exercised when granting a decree of divorce of judicial separation under s. 76 of the Law Reform (Marriage & Divorce) Act 1976 ('the LRA'). Until the High Court, in its matrimonial jurisdiction, decides the apportionment of these assets between the husband and wife, the interest of both spouses
H in any particular asset remains indeterminate and inchoate and thus, the interest of the spouse could not be a caveatable one. If the purpose of the lodgement of a private caveat is to merely protect matrimonial assets from being disposed or dissipated, the more appropriate remedy would be an injunction under s. 102 of the LRA. There is no basis in law to
I enter a caveat for an inchoate and indeterminate interest when an alternative and more suitable remedy is available between parties who are husband and wife. (para 41)

(3) The defendant submitted that he had paid the initial down payment for the property to be purchased in their joint names and that the monthly instalments to repay the loan were provided by him. Apart from payment of the deposit sum and six monthly instalments paid in 2014, there was no evidence of any direct financial contribution by the defendant towards the purchase of the property. It was the plaintiff who paid the balance of the purchase price with her own financial resources and through the loan from the bank. (paras 42 & 45)

(4) The defendant argued that a presumption of resulting trust arose from his advancement of payment. However, despite the advancement, the defendant allowed the plaintiff to be the sole purchaser and the sole registered owner. The bank loan was also under the plaintiff's name. In law, the presumption of advancement arises because of the relationship of the parties. When such presumption arises, it would negate any presumption of a resulting trust. This means that a resulting trust would not arise if the person receiving is, *inter alia*, the giver's wife. Presumption of advancement can be rebutted if the party claiming otherwise can show that at the time of the transaction, there was common intention between the giver and the receiver that it was to be otherwise. The defendant had not discharged this onus by adducing sufficient evidence in this regard. (paras 42, 43 & 45)

(5) The plaintiff had established that the balance of convenience or the balance of justice laid in favour of the caveat's removal as otherwise, the plaintiff would not be able to proceed with the sale of the property and the bank would continue with the foreclosure action, leading to the auction sale of the property. If indeed the defendant was the beneficial owner, he should have stepped in to regularise the loan and save the property from foreclosure action. The fact that he had chosen not to do so, leaving the plaintiff at the mercy of the chargee/bank, diminished his case for the caveat to remain. (para 50)

Case(s) referred to:

Bethian Pty Ltd v. Green [1977] 3 Fam LR 11,579 ***(refd)***
Chen Sook Peng v. Wee Phean Yung [2003] 1 LNS 539 HC ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***
Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron [2009] 10 CLJ 95 HC ***(refd)***
Dembitzer v. Mills [1980] 2 NSWLR 697 ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***
Francis Karel Rene Joseph Himpe v. Theresa Gina Arteta Frias [2015] 1 LNS 317 HC ***(refd)***
Goo Hee Sing v. Will Raja Perumal & Anor [1994] 1 CLJ 255 HC ***(refd)***
Hayes v. O'Sullivan and Another [2001] 27 Fam LR 46 ***(refd)***
Heng Gek Kiau v. Goh Koon Suan [2007] 6 CLJ 626 CA ***(refd)***
Ioppolo v. Iopolo (1978) 5 Fam LN No 27 ***(refd)***
Joint Petition Of Heng Peng Hoo & Goh Ah Moy [1989] 2 CLJ 833; [1989] 1 CLJ (Rep) 639 HC ***(refd)***

A *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC* ***(refd)***
Law Pik Tai v. Wong Nyiik Foon [2002] 4 CLJ 486 HC ***(refd)***
Leake v. Bruzzi [1974] 1 WLR 1528 ***(refd)***
Lee Yu Lan v. Lim Thain Chye [1983] 1 LNS 41 HC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
B *Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209 FC* ***(refd)***
Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 HC ***(refd)***
Mosbert Bhd v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***
Rajendar Kaur Bakhtawar Singh v. Jeswant Singh Bakhtawar Singh [1987] 1 CLJ 468; [1987] CLJ 310 SC ***(refd)***
C *Re Pile's Caveats [1981] Qd R 81* ***(refd)***
Re Week's Caveat [1971] Qd WN 4 ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 PC ***(refd)***
Syed Ibrahim Syed Abdul Rahman v. Liew Su Chin (F) [1983] 1 LNS 45 FC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
D *Tan Heng Poh v. Tan Boon Thong & Ors [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316 SC* ***(refd)***
Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***

Legislation referred to:
E Law Reform (Marriage And Divorce) Act 1976, ss. 76(1), (3), 102
National Land Code, ss. 323(1), 327(1), 328, 329

Family Law Act 1975 [Aus], s. 79
Matrimonial Causes Acts 1959 [Aus], s. 86(1)
Transfer of Land Act 1893 [Aus], s. 137

F *For the plaintiff - Yap Bell Pung & Joshua Vijayan Dharmaraj; M/s Bell & Lee*
For the defendant - Ira Nadhirah Ismail; M/s Azharudin & Assocs

Reported by Najib Tamby

G **JUDGMENT**

Vazeer Alam Mydin Meera J:

[1] This is an application by the plaintiff, under ss. 327 to 329 of the National Land Code (NLC) for orders, *inter alia*, to remove a private caveat lodged by the defendant, on a piece of land held under Lot No. 12105, PN
H No. 36844 at Mukim Bukit Katil, District of Melaka Tengah, Melaka, on which a bungalow is erected bearing postal address No. 2, Jalan Vista Kirana 3, Taman Vista Kirana, 75450 Gapam, Melaka (hereinafter referred to as 'the property').

I **[2]** The plaintiff is the registered proprietor of the property. The defendant who is the plaintiff's husband lodged the private caveat *vide* Presentation No: 4924/2014 registered on 16 October 2014 against the whole of the property (hereinafter referred to as "the caveat").

[3] The plaintiff contends that the caveat ought to be removed pursuant to s. 327 of the NLC as the defendant does not have any caveatable interest on the property and consequent thereto prays that damages be assessed as provided under s. 329 of the NLC. The defendant contends otherwise and states that he has a caveatable interest on the property and that the caveat ought to remain.

[4] The cause papers filed by the parties are as follows:

(i) The originating summons filed herein as encl. 1 (hereinafter referred to as "this originating summons"); and

(ii) The statement to the originating summons (hereinafter referred to as "the said statement");

(iii) The affidavit sworn by the plaintiff on 3 December 2015 in support of this originating summons (hereinafter referred to as "the plaintiff's affidavit support"); and

(iv) The affidavit sworn by the defendant on 11 April 2016 in reply to the plaintiff's affidavit support (hereinafter referred to as "the defendant's affidavit reply"); and

(v) The affidavit sworn by the plaintiff on 25 April 2016 filed as encl. 10 in reply to the defendant's affidavit reply (hereinafter referred to as "the plaintiff's affidavit reply 1"); and

(vi) The affidavit sworn by the defendant on 5 May 2016 (afidavit jawapan No: 2) in reply to the plaintiff's affidavit reply 1 (hereinafter referred to as "the defendant's affidavit reply 2"); and

(vii) The affidavit sworn by the plaintiff on 20 May 2016 filed as encl. 11 in reply to the defendant's affidavit reply 1 (hereinafter referred to as "the plaintiff's affidavit reply 2").

[5] Parties have filed lengthy written submissions and upon request of learned counsel, I had also heard oral arguments. Having considered the application, supporting affidavits and submissions, I had allowed the plaintiff's application in the originating summons and ordered the removal of the caveat for the following reasons.

[6] The antecedent facts are as follows. The plaintiff and defendant were lawfully married on 14 February 2004 and have three children. After the marriage, the plaintiff and defendant had lived together successively in several matrimonial homes, the last of which is the property.

[7] The property was purchased in the course of their marriage at the price of RM900,000. The property was originally booked for purchase in the joint names of the plaintiff and defendant. The booking form dated 22 February 2011 marked as exh. TTH1 of the defendant's affidavit in reply confirms this.

[8] The defendant had on 22 February 2011 paid the initial down payment/booking fee of RM5,000 to GJH Properties Sdn Bhd, the vendor/developer of the property. Subsequently, on or about 24 March 2011, the defendant paid a further sum of RM45,000 to the vendor/developer towards the 10% deposit and part payment of the purchase price, hence making a total payment of RM50,000.

[9] The plaintiff states that prior to the execution of the sale and purchase agreement on 6 May 2011 (hereinafter referred to as "the original sale and purchase agreement") the defendant had, by way of advancement, gifted this entire payment of RM50,000 to the plaintiff as his lawful wife (hereinafter referred to as the "gift"). And therefore, the plaintiff signed the sale and purchase agreement dated 26 May 2011 as the sole purchaser of the property. The original sale and purchase agreement dated 6 May 2011 is marked as exh. NLL4 in the plaintiff's affidavit in support.

[10] The plaintiff obtained a bank loan of RM765,333 (hereinafter referred to as "the loan") from Public Bank Berhad (hereinafter referred to as "Public Bank Bhd") to part finance the purchase. Therefore, the balance between the purchase price (RM900,000) and the loan was RM134,667 and after deducting the gift (of RM50,000), the differential sum to be paid by the plaintiff was RM84,667 (hereinafter referred to as "the differential sum"). The plaintiff states that she had paid the differential sum from her own financial resources. Upon settlement of the full purchase price, the vendor/developer transferred ownership of the property to the plaintiff and she is now the sole registered proprietor. The plaintiff thereafter charged the property to Public Bank Bhd through Presentation No. 0400SC2011008395 on 5 July 2011 (hereinafter referred to as 'the charge') as security for the repayment of the loan. The plaintiff avers that she had paid the monthly loan repayment to Public Bank Bhd until December 2013.

[11] In or about the month of December 2013, the plaintiff left the property following matrimonial discord arising from, *inter alia*, the defendant's alleged drug abuse problem and issues of alleged domestic violence against the plaintiff. The plaintiff has since March 2014 permanently left the property and her two elder children are with her, whilst the youngest is with the defendant.

[12] Sometime on or about 13 October 2014, ie, after the plaintiff had left the property, the defendant lodged the caveat claiming that he has a beneficial interest in the property. However, after entering the caveat, the defendant has to-date, not filed any consequent proceedings to claim any legal or beneficial interest in the property. On 4 June 2015, the plaintiff filed a divorce petition at the High Court in Malaya at Malacca *vide* Divorce Petition No: 33-71-06-2015 (hereinafter referred to as "the divorce petition"), which is pending adjudication.

[13] The plaintiff states that she is facing financial difficulties in servicing the loan. The defendant had, partly by utilising funds from their joint overdraft account, paid the loan instalments for six months ie, January till June of 2014, and thereafter stopped. The plaintiff states that since the defendant no longer maintained her and her two elder children, and further because the loan repayment is in default leading to Public Bank Bhd commencing foreclosure proceedings against the plaintiff, she was left with no option but to sell the property. She has since entered into a sale and purchase agreement dated 23 April 2015 with one Lee Hong Kok (hereinafter referred to as "the new sale and purchase agreement") to sell the property. In order to regularise the loan repayment, it is a condition of the sale that the said purchaser, Lee Hong Kok, shall continue to make payment of the monthly loan instalment to Public Bank Bhd until completion of sale. These payments by the purchaser will be taken as part payment of the purchase price. The plaintiff seeks the removal of the caveat to allow the sale to be completed.

[14] In considering this application, let me address the issue of law relating to private caveats and caveatable interest. It is trite law that only a person/body who has caveatable interest can lodge a caveat on the land. It is also trite that a caveator must prove the existence of his caveatable interest before the caveat is allowed to stand. To be caveatable, these claims must represent claims that can lead to the making of a substantive entry on the register, either because the interest will become registrable or because it is one for which equitable relief by way of specific performance can be sought to enable ultimate registration. It is also the requirement of law that the basic legal requirements laid down by the NLC for compliance when lodging a private caveat must be strictly adhered to. Thus, only interests recognised by the NLC are protectable by caveat. See *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441; [1984] 2 MLJ 113 FC.

[15] These principles were reiterated by Gopal Sri Ram JCA in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719 as follows:

> Caveatable Interest
>
> To paraphrase s. 323(1)(a) of the Code, a private caveat may be entered at the instance of any person or body who claims either:
>
> (1) the title to the land; or
>
> (2) any registrable interest in land.
>
> The parameters of caveatability under s. 323(1)(a) are therefore circumscribed by these words: "title" and "registrable interest". It is only one who makes a claim to either of these in land may enter a private caveat.

A Although the words "title" and "registrable interest" are not defined by the Code, their meaning may be gathered from the scheme of the Code and from the indefeasibility provision, namely, s. 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.

B In my judgment, the position that obtains under the Code, so far as is relevant to the present appeal, may be stated in the following way. The Code creates three categories (emphasis added) of interests in land. They are as follows.

Category 1: registrable interests in land

C Only certain interests are capable of registration. Within this are two sub-categories, namely:

(a) Registered title. This may be for perpetuity or for a term of years. It pertains to ownership of land. The "owner" is termed by the Code as a "registered proprietor"; and

D (b) Registrable interests falling short of ownership. These are leases, charges and easements.

Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The Code, in s. 340(1), confers
E indefeasibility upon registered title and interests in land. Section 340(2) creates exceptions which, if established, may operate to defeat such registered title or interest.

Category 2: interests that are incapable of registration

These include [emphasis added] tenancies exempt from registration,
F which may be protected by means of an endorsement upon the register document of title.

Category 3: caveatable interests

These are unregistered interests which are capable of protection by the entry of a private caveat. In the context of s. 323(1)(a), it is only a claim
G to the interests falling under category 1(a) and (b) above that may be protected by the entry of a private caveat (emphasis added). Cases falling under category 2 are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest. Protection for such interests must be secured in the manner prescribed by the Code.

H I fear that any other construction upon s. 323(1)(a), especially one that places a meaning wider than that I subscribe to, may result in judicial disobedience to the will of Parliament: and that in my view should be avoided at all costs.

[16] Further, the learned judge in that case reiterates that the court in
I hearing an application under s. 327(1) for the removal of a private caveat would be well advised to approach it in three stages, namely, (i) the caveator satisfying the court that he has a caveatable interest by examination of the grounds expressed in the private caveat lodgment documents (Form 19B and

the accompanying statutory declaration); (ii) the caveator satisfying the court that on the evidence presented in the affidavits, his claim to an interest in the land raises a serious question to be tried; (iii) after having done so the caveator must go on to show that the balance of convenience tilts in favour of the caveat being extended until the disposal of the main action. See also the cases of *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150; [1992] 1 MLJ 263 SC; *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441; [1984] 2 MLJ 113 FC, *Mosbert Bhd v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 SC; *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212.

[17] In the present case, the defendant did not set out his claim to title or registrable interest in the property in the Form 19B. The defendant merely states in item 2 of the Form 19B as follows:

> 2. Alasan-alasan tuntutan ke atas *tanah/kepentingan itu ialah:
>
> Seperti yang dinyatakan dalam Surat Akuan saya yang telah dilampirkan di sini.

Meaning that the grounds for the entry of the caveat are as stated in the defendant's statutory declaration sworn on 13 October 2013, wherein he affirms as follows:

> 1. Saya, TING TIAN HWA (No. K/P: 721230-04-5029) adalah benefisial yang sah bagi hakmilik PN 36844, Lot 12105, Mukim Bukit Katil, Daerah Melaka Tengah, Negeri Melaka.
>
> 2. Namun demikian, walaupun nama NG LI LIN (No. K/P : 761132-04-5038) telah digunakan sebagai pemilik di atas hakmilik tersebut, tetapi sebenarnya secara sahnya, tanah dan harta di atasnya mempunyai kepentingan saya sepenuhnya juga. Saya hanya membenarkan meletakhak namanya sebagai pemilik sahaja.
>
> 3. Saya membuat akuan bersumpah ini dan memasukkan kaveat keatas hakmilik-hakmilik tersebut agar tidak timbul sebarang persenketaan di masa hadapan mengenai hakmilik tersebut dan saya meminta setiap waris saya menghormati akuan bersumpah saya ini dan memberi semula hakmilik-hakmilik ini kepada saya atau waris saya kelak apabila di minta berbuat demikian.

[18] The grounds set out by the defendant in his statutory declaration are vaguely that:

(i) the defendant is the "benefisial yang sah" – by that it is unclear whether he means that he is a lawful beneficiary to the property or whether is he is the beneficial owner of the property or that he has some undisclosed beneficial interest in the property; and

A (ii) the defendant had allowed the name of Ng Li Lin (No. k/p: 761123-04-5038), ie, the plaintiff, to be used as the registered owner of the property; and

(iii) the defendant has an interest in the property but he had chosen to vest the whole of the property in the name of Ng Li Lin (No. k/p: 761123-
B 04-5038); and

(iv) the defendant lodged the caveat to avoid any future dispute regarding ownership of the property and the defendant further requests that his heirs respect his proprietorship of the property and return ownership to him in the future when asked.
C

[19] A scrutiny of the defendant's application for entry of private caveat in the prescribed Form 19B and the statutory declaration annexed thereto shows that the grounds relied on by the defendant to lodge caveat is rather imprecise. The nature of the defendant's claim as required by item 2 of Form
D 19B is vague and ambiguous. The defendant states in the statutory declaration "saya adalah benefisial sah." However, the defendant fails to state how he acquired his beneficial interest in the property, ie, was it by way of financial contribution towards its purchase or is it by way of an equitable interest in a matrimonial property or is it by way of a trust.

E **[20]** The defendant does not state whether he was the one who paid the whole of the purchase price for him to be the sole beneficial owner of the property. Neither does the defendant state the amount of the defendant's contribution towards the purchase consideration. Nor does he even state the fact that Ng Lin Lin, the registered proprietor, is his lawful wife and that the
F property is their matrimonial home. Any person making a search on the defendant's caveat application form would have no notice of the exact nature of the defendant's interest in the property. The legal requirement to state the nature and exact grounds of the caveator's interest in the caveat lodgment form was emphasised by the Court of Appeal in *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854; [1997] 2 MLJ 487 and that
G requirement has been consistently reiterated by the courts.

[21] The law is clear in that the failure of a caveator to satisfactorily state the grounds to support a caveat was sufficient for the court to remove the caveat. Thus, I agree with the contention of learned counsel for the plaintiff
H that the manner in which defendant's alleged caveatable interest in the property is set out in the Form 19D is flawed and fails to meet the minimum legal requirements of stating the exact nature and extent of his alleged beneficial interest. Thus, I find that the defendant has not shown a definite, determinate, and registrable interest in the said property, and this by itself
I is sufficient for the court to remove the caveat. See the cases of *Goo Hee Sing v. Will Raja Perumal & Anor* [1994] 1 CLJ 255; [1993] 3 MLJ 610; *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212; *Syed Ibrahim Syed Abdul Rahman v. Liew Su Chin (F)* [1983] 1 LNS 45; [1984] 1 MLJ 160;

Rajendar Kaur Bakhtawar Singh v. Jeswant Singh Bakhtawar Singh [1987] 1 CLJ 468; [1987] CLJ (Rep) 310; [1987] 1 MLJ 214; and *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719.

[22] Nevertheless, despite the lack these particulars in the Form 19B and the statutory declaration, learned counsel for the defendant submits that the defendant's equitable interest in the property arises in two ways, ie, firstly by reason of the fact that the property is the matrimonial home of the parties and that they have been residing in it from 2011 until 2013 when the plaintiff left the home; and secondly by reason of the defendant having contributed financially to the purchase of the property. Though these facts are not stated in the Form 19D or the statutory declaration, I will for sake of completeness consider these arguments.

[23] Let me consider the first issue, which is whether a spouse has a caveatable interest in matrimonial property that is registered in the name of the other spouse. When a man and a woman enter into a lawful union, all assets acquired during their marriage come under the purview of s. 76 of the Law Reform (Marriage And Divorce) Act 1976. Section 76 of the Act gives the court power, when granting a decree of divorce or judicial separation, to order the division between the parties of assets acquired during the marriage, whether by their joint efforts or the sole effort of either party. The considerations for the exercise of that power are set out therein. Until the court exercises that power, those assets remain matrimonial assets, belonging to them – until such time as their respective rights thereto are determined by death, or by divorce or judicial separation.

[24] If during a marriage, one party to the marriage intends to dispose of property acquired during the marriage with the object of depriving his or her spouse of any rights in relation to that property, that other spouse may immediately bring matrimonial proceedings, and apply for an injunction under s. 102 of the Law Reform (Marriage And Divorce) Act 1976.

[25] Section 102 of the Law Reform (Marriage And Divorce) Act 1976, gives the court power to grant an injunction preventing such disposition, or if any disposition has been made within the preceding three years, with such an object on the part of the spouse making the disposition, to set aside that disposition. A spouse therefore has a remedy in family law, to protect his or her interest in assets acquired during his or her marriage.

[26] The defendant in this case chose not to seek that remedy. Had he done so, he would have to show that the plaintiff was disposing of the property with the intention of depriving him of his rights in relation to assets acquired during the marriage. Now, would he have been able to do so? Is this the only asset of value acquired by the parties during the marriage? Are there substantial other assets under his or her control from which any legitimate

A claim by him to a share of assets acquired during the marriage can be met? What assurance is there that in exercising its discretion in dividing the assets, that the family court will grant any particular property to him, or apportion the assets in any particular manner? Can it be inferred from her conduct that the plaintiff intends to deprive him of his rights, so that he will suffer
B prejudice if the plaintiff, in these circumstances, sells the property? These are questions that the defendant would have to satisfactorily answer the court in order to succeed on such an application. And from the facts disclosed, it seems more probable than not that the defendant would not be able to satisfy the court of these matters before the court grants any injunctive relief.

C **[27]** It must be remembered that the power of the court sitting in its matrimonial jurisdiction is to divide the assets acquired during the marriage. It is not a power to divide each asset, where the assets are many, as in this case. It is at once apparent from the facts that getting such an injunction in the circumstances of this case would have been difficult for the defendant.

D **[28]** The plaintiff, in her affidavits, alleges that the defendant has appropriated monies payable to the plaintiff personally by Exotic Legacy Sdn Bhd in the sum of RM115,000 thus depriving her of funds to service the loan. In para. 20 of her affidavit in support, the plaintiff alludes to the fact that the defendant has also failed to contribute to the support of two of his
E children, and that this has forced her to put up the property for sale. These facts remain uncontroverted.

[29] It seems obvious that insofar as the defendant claims to be trying to preserve a matrimonial asset, the defendant took the easier route, the path of least resistance. He chose to enter a caveat on the property instead of
F seeking injunctive relief. This he had done without paying the monthly instalments to Public Bank Bhd, knowing well that this would mean the plaintiff would be in default of the loan. Though the chargee bank had commenced foreclosure action, the defendant did not make any attempt to regularise the loan default. Thus the defendant's claim that he was protecting
G a matrimonial asset by lodging the caveat rings hollow.

[30] In family law, it is trite that a spousal claim to a share in the matrimonial home is indeterminate until the court makes an order for division of the matrimonial assets and properties and the time to do so is when the court makes a decree of divorce or judicial separation. The Federal
H Court in interpreting s. 76(1) and (3) of the Law Reform (Marriage And Divorce) Act 1976 confirmed this in *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209. The question that arises then is whether a spouse can lodge a caveat based on such indeterminate right.

I **[31]** Skinner J (later JCA) in *Law Pik Tai v. Wong Nyiik Foon* [2002] 4 CLJ 486; [2002] MLJU 263 in construing a similar issue held that a spouse's interest in matrimonial assets and properties, when no order for distribution has been made under s. 76 of the Law Reform (Marriage And Divorce) Act

1976, is a right in future which is incapable of being a caveatable interest, as a caveatable interest can only arise from a right "*in praesinti*" and not a right "*in futuro*". The following passage from the judgment is apposite as it sets out the learned judge's reasoning for that proposition:

> It is also my view that although the right of a wife to claim for a division of matrimonial assets is a right which may affect or concern land and eventually even entitle a wife to a transfer thereof or to the proceeds thereof, yet the right is not a presently enforceable right in land but one that is contingent and which may only become enforceable at a future date. In *Goo Hee Sing v. Will Raja & Anor.* [1993] 3 MLJ 610, the issue before the court was whether in the face of a restriction in interest indorsed on the title to the disputed land, the caveat filed by the plaintiff there was a nullity. In answering that question, Shankar J (as he then was) held that in order for the plaintiff to file a caveat, he must have a title to land or a right thereto '*in praesinti*' and not to some contingent title or right thereto '*in futuro*' and that until the consent of the 'Pihak Kuasa Negeri' was first irrevocably obtained, a prospective purchaser can have no caveatable interest in such land. I respectfully agree with the reasoning there and would regard the claim of the defendant here to a right in the division of the said lands as a contingent right '*in futuro*' and not capable of supporting a caveatable interest in land.
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> ...
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> ... claim for a division of the matrimonial assets under the Act, being an unascertained right until an order is made by the court when granting a divorce or judicial separation, cannot be in any better position than the right of a residuary beneficiary under the will of a deceased who lodges a caveat against land belonging to the estate and where it has been held on high authority that residuary beneficiaries are not "entitled to" or "beneficially interested in" land forming part of an estate and therefore do not have a caveatable interest in land belonging to the estate until the administration of the estate is complete and the residue fully ascertained.

The principle that the unascertained rights of beneficiaries of an undistributed estate of a deceased is incapable of giving rise to a caveatable interest alluded to by Skinner J in that decision is found in the judgment of the Court of Appeal in *Tan Heng Poh v. Tan Boon Thong & Ors* [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316; [1992] 2 MLJ 1. Although the correctness of this decision in another respect, not relevant for present purposes, has been called into question and effectively reversed (see *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; [1994] 3 MLJ 345), it remains as authority for the proposition that a beneficiary under a will has no caveatable interest until his testator's estate has been fully administered.

[32] Similarly, in *Chen Sook Peng v. Wee Phean Yung* [2003] 1 LNS 539; [2004] 5 MLJ 116, when domestic problems arose the husband claimed an interest in the matrimonial home registered in the name of the wife on grounds that it had been purchased from the profits of a transport company that both spouses ran and that the husband had also paid three of the monthly

loan instalments. The husband claimed to have a share in the matrimonial home and lodged a private caveat. The wife applied to remove the caveat under s. 327 of the NLC and VT Singham J in allowing the removal held that although s. 76 of the Law Reform (Marriage & Divorce) Act 1976 gave the court the discretion to decide and order a division of the community property of the married couple, this was dependent and subject to the individual contribution by the parties. If the respondent succeeded in his claim, in the divorce action, on his right to a share to the said property based on his contributions, that fact alone would not directly give the respondent a caveatable interest to the said property. This was because the respondent could be awarded the value of the money based on his contribution or given some other property *in lieu* thereof. Any decision or order to be made in the divorce petition would be at the court's discretion and it may not necessarily be one in which the court gives any one property in whole or in part to one spouse. See *Joint Petition Of Heng Peng Hoo & Goh Ah Moy* [1989] 2 CLJ 833; [1989] 1 CLJ (Rep) 639; [1989] 3 MLJ 103, *Lee Yu Lan v Lim Thain Chye* [1983] 1 LNS 41; [1984] 1 MLJ 56 and *Leake v. Bruzzi* [1974] 1 WLR 1528.

[33] The pronouncements of law made by Skinner J and VT Singham J in the above cases are similar to those made by courts in Australia. And since our Torrens system of land registration follows that of Australia, I propose to consider the position in that jurisdiction as persuasive guidance.

[34] In *Re Week's Caveat* [1971] Qd. WN 4, a case Skinner J had referred to in *Law Pik Tai*, the husband had applied to remove a caveat entered by his wife on property of which he was the registered proprietor, in which she claimed a half-share in the said property. The wife had filed a petition for divorce, seeking dissolution of the marriage, as well as settlement for her benefit of the husband's interest in the said property. The husband claimed that the wife had no caveatable interest in the said property. The judge noted that the wife's basis for the caveat was that the court will or may make an order for settlement of the property in her favour pursuant to the provisions of s. 86(1) of the Matrimonial Causes Act 1959-1966. Hoare J held that the mere possibility of the court exercising jurisdiction under the Matrimonial Causes Act to make an order for settlement of matrimonial property in favour of a wife is not an estate or interest in the land which is capable of supporting a caveat.

[35] Similarly, in *Bethian Pty Ltd v. Green* [1977] 3 Fam. LR 11,579 Powell J ordered the wife to withdraw a caveat that she had lodged on a property which was the former matrimonial home, and the subject of proceedings in the family court. The court held that the wife's claim on the property (which was held by a company in which she claimed she had been fraudulently deprived of her shareholding, by the husband) was not a claim for an interest in the real estate, but rather a claim for relief in the family court.

[36] And in *Re Pile's Caveats* [1981] Qd R 81, the wife had entered two caveats on certain property held in trust by the applicants. The husband and wife were living apart. No matrimonial proceedings had yet been filed. The wife had, however, applied for injunctions to restrain the husband and the two applicants from dealing with the said lands. The said properties had been purchased in the joint names of the husband and wife, but later transferred to the trustee companies. The wife had at that time agreed to the said transfers on a representation by the husband that the beneficial interest in the said lands would not be affected. The court held that the existence of a *prima facie* equity to relief involving land is not necessarily the same as the *prima facie* existence of an interest in the land. The court further held that, as the caveator claimed a personal equity enforceable against her husband and that the trustees to have the lands reconveyed to her because of the fraud of her husband, the caveats should be removed, as these were not caveatable interest.

[37] In *Hayes v. O'Sullivan and Another* [2001] 27 Fam LR 46 the Supreme Court of Western Australia held that a claim under s. 79 of the Family Law Act 1975 is not an interest in land within the meaning of s. 137 of the Transfer of Land Act 1893 (WA), and therefore is not a caveatable interest, and that a spouse cannot rely on a constructive trust as a caveatable interest. At para. 20, (p. 466 of the report) the court referred to *Iopolo v. Iopolo* [1978] 5 Fam LN No. 27 (unreported) where the full court had held that a claim for settlement of property under the Family Law Act is not an interest in land within the meaning of s. 137 of the Transfer of Land Act and accordingly is not a caveatable interest. At para. 27 (p. 467 of the report) the court also referred to the case of *Dembitzer v. Mills* [1980] 2 NSWLR 697 where the Supreme Court of New South Wales had said that if the defendant were apprehensive that the plaintiff would dispose of the land, his remedy was not a caveat under the Real Property Act based on an existing estate or interest, but an injunction by the family court restraining the plaintiff from dealing with the land and so preserving the property which might in the end be the subject of an order of the family court.

[38] A similar observation was made by Skinner J in *Law Pik Tai* where the learned judge in removing the caveat lodged by defendant had opined that, though the decision may seem harsh, the defendant is not without remedy in that under s. 102 of the Law Reform (Marriage And Divorce) Act 1976, the court has the power upon an application in any pending matrimonial proceedings to grant an injunction to prevent the disposition of matrimonial property in the circumstances therein described.

[39] Learned counsel for the defendant argues to the contrary and refers to the case of *Francis Karel Rene Joseph Himpe v. Theresa Gina Arteta Frias* [2015] 1 LNS 317; [2015] 3 MLRH 5553, where in maintaining a private caveat lodged by the plaintiff-husband to protect assets acquired during the marriage, and the distribution of which would be decided upon the

dissolution of the marriage, the High Court had held that a beneficial interest may be created by way of constructive or resulting trust arising from matrimonial assets and that s. 323(1) of the NLC was wide enough to include such beneficial interest as one that is capable of maintaining a caveat. The court thus held that a caveatable interest arises from such constructive or resulting trusts. Learned counsel for the defendant had urged the court to follow this case to allow the caveat to remain.

[40] I am, with due respect, unable to accept that argument. I am more inclined to accept the proposition of law expounded by Skinner J and VT Singham J in the cases referred to earlier as I find the legal reasoning therein more compelling and convincing. The judgment in *Francis Karel Rene Joseph Himpe* did not consider the in-depth discussion of legal principles regarding matrimonial properties in both the judgments of Skinner J and VT Singham J. A reading of the judgment in *Francis Karel Rene Joseph Himpe* shows that the learned judge had not been referred to the earlier judgments of Skinner J and VT Singham. If it had been done, the decision in that case may very well be different. Further, in *Francis Karel Rene Joseph Himpe*, while waiting for the dissolution of his marriage, the plaintiff sought to protect the matrimonial assets by lodging the caveat in question on grounds that the properties are held on a constructive or resulting trust. Now, that reasoning cannot apply to the facts of this case as such a fact is not alluded to in the statutory declaration in support of the Form 19B.

[41] Additionally, in respect of assets acquired during a marriage, ie, matrimonial assets, the exclusive jurisdiction to decide on the rights of the parties to a share of such assets lies with the High Court exercising its matrimonial jurisdiction. That jurisdiction can only be exercised 'when granting a decree of divorce or judicial separation', under s. 76 of the Law Reform (Marriage & Divorce) Act 1976, as decided by the Federal Court in the case of *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209. Thus, considering that the assets in these cases came under the purview of s. 76 of the Law Reform (Marriage And Divorce) Act 1976, until the High Court in its matrimonial jurisdiction decides the apportionment of these assets between the husband and wife, the interest of both spouses in any particular asset remains indeterminate and inchoate, and thus the interest of the spouse cannot be a caveatable one. If the purpose of the lodgment of a private caveat were to merely protect matrimonial assets from being disposed or dissipated, as it seems to be in *Francis Karel Rene Joseph Himpe*, and in this case too, then the more appropriate remedy would be an injunction under s. 102 of the Law Reform (Marriage & Divorce) Act 1976. In this regard, I am also inclined to follow the persuasive Australian authorities referred to above and in particular *Hayes v. O'Sullivan and Another* [2001] 27 Fam LR 462 where the court held that a claim for distribution of matrimonial assets in matrimonial proceedings is not an interest in land and therefore is not a caveatable interest, and that a spouse cannot rely on a constructive trust as

giving rise to a caveatable interest. The same applies in our case, as the defendant is claiming a *prima facie* equity in an asset acquired during his marriage to the plaintiff. It is therefore clear that there is no basis in law to enter a caveat for an inchoate, indeterminate interest, when an alternative and more suitable remedy is available, between parties who are husband and wife. On the basis of it being a matrimonial asset, the defendant has not shown any basis for his claim that he has a caveatable interest in the property.

[42] On the second ground of the defendant's alleged contribution towards the purchase of the property giving rise to an equitable interest in the property my views are as follows. The defendant had paid the said sum of RM50,000 as the initial down-payment for the property to be purchased in their joint names. The defendant also states that the monthly instalments to repay the loan were provided by him. On this basis the defendant is arguing that a presumption of resulting trust arises. However, despite the initial advancement of RM50,000, the defendant allowed the plaintiff to be the sole purchaser, and the sole registered owner. The bank loan is in the sole name of the plaintiff. These facts, the plaintiff contends, clearly points to an intention on the part of the defendant that his contribution would be a gift to the plaintiff, his lawful wife. The plaintiff further argues that as the parties, are not strangers but are in fact lawful husband and wife, a presumption of advancement applies in favour of the plaintiff.

[43] In law, the presumption of advancement arises because of the relationship of the parties, and when such presumption arises it would negate any presumption of a resulting trust. This means that a resulting trust would not arise if the person receiving were the giver's wife or child or someone to whom the giver stands *in loco parentis*. However, the presumption of advancement can be rebutted if the party claiming otherwise can show that at the time of the transaction there was between say the husband (giver) and the wife (receiver) a common intention that it was to be otherwise.

[44] The onus to show this would be on the giver. See *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 FC; and *Heng Gek Kiau v. Goh Koon Suan* [2007] 6 CLJ 626 CA; *Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron* [2009] 10 CLJ 95; [2009] 8 MLJ 510.

[45] However, I do not find the defendant having discharged this onus by adducing sufficient evidence in this regard. Apart from the RM50,000 paid initially towards the deposit sum and the six monthly instalments paid in 2014, there is no evidence of any direct financial contribution by the defendant towards the purchase of the property. Aside from these sums of monies paid by the defendant, the plaintiff had paid the balance of the purchase price with her own financial resources and through the loan from Public Bank Bhd.

[46] At this stage, it is incumbent upon the defendant to show that there are serious questions meriting a trial. Gopal Sri Ram JCA (as he then was) elaborated in *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181; [1985] CLJ (Rep) 575; [1986] 1 MLJ 315 that even if the caveator has correctly stated his claim to a registrable interest in the caveat entry form, the caveator must still adduce evidence to prove the existence of such an interest before the caveat may be allowed to stand. This, I find the defendant has failed to do and on this score too the caveat cannot stand, as no serious question for trial is established.

[47] Granted that if the defendant were to successfully rebut the presumption of advancement and show that the intention of parties was for the plaintiff to hold the property on a resulting trust for him, then he would have an interest capable of leading to registration. And that would be a caveatable interest. Again it would be important to point out that the defendant has not alluded to any such trust in the Form 19B or the statutory declaration nor has he adduced sufficient evidence in this regard.

[48] Now, if the defendant had adduced sufficient evidence in this regard, I accept that the fact of whether there is a presumption of advancement or a presumption of resulting trust is a serious question to be tried. Even if the defendant surmounts this hurdle, it must be gainsaid that the defendant has not filed any proceedings in court to assert his claim of a resulting trust, nor has he sought any consequential relief in respect of this particular asset, after entering the caveat. There are, however, matrimonial proceedings pending, which were filed by the plaintiff more than seven months after the defendant entered the caveat. Those matrimonial proceedings will in due course decide the rights of the parties to a share each of the assets acquired during their marriage, but not on the issue of whether the defendant is the owner of the whole of the property by virtue of a resulting trust.

[49] Now, even if the contents of the Form 19D and the statutory declaration is construed to mean that it discloses some equitable interest capable of leading to registration, and thus giving rise to a caveatable interest, there is another serious and fatal impediment to the defendant's claim. The defendant to date has not instituted any proceedings to establish his rights and interest in the property. The defendant's failure to commence any proceedings whatsoever to enforce the alleged interest, interim protection of which had been secured by the entry of the caveat is fatal. Lord Diplock in *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135; [1976] 2 MLJ 44 PC opined that:

> The purposes of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts.

And in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212 PC, the same learned judge stated the proposition in almost similar terms. This principle has been consistently applied by the courts in applications for removal of caveats, when the caveator after having lodged the caveat does nothing more to prosecute his claim.

[50] In any event, I find that the plaintiff has established that the balance of convenience or the balance of justice lies in favour of the caveat's removal as otherwise the plaintiff would not be able to proceed with the sale of property and Public Bank Bhd would continue with the foreclosure action, leading to the auction sale of the property. If indeed the defendant is the beneficial owner, he should have stepped in to regularise the loan and save the property from foreclosure action. The fact that he has chosen not to do so, thus leaving the plaintiff at the mercy of the chargee bank, diminishes his case for the caveat to remain. Therefore, to my mind, it is clear that the caveat stands alone, entirely without any basis, and that it ought to be removed.

[51] Thus, I allowed the plaintiff's application as in prayers (1) and (2) of the originating summons and ordered the removal of the caveat. Cost of RM8,000 to be borne and paid by the defendant to the plaintiff.